ARIZONA SUPREME COURT
Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings
Minutes
June 07, 2012

Members present:	Members present (cont'd):	Guests:
Hon. Robert Brutinel, Chair	Karen Arra	Jennifer Liewer
Hon. James Conlogue	David Bodney	Stewart Bruner
Hon. Dan Dodge	Joe Kanefield	Theresa Barrett
Hon. Margaret Downie	Robert Lawless	Rose Meltzer
Hon. Michael Jeanes	Robin Phillips	Sam Meltzer
Hon. Eric Jeffery	Kathy Pollard	Paul Julien
Hon. Scott Rash	Marla Randall (by telephone)	Michaela Waisman
	George Riemer	Melinda Hardman
		Jennifer Greene
Members not present:	Staff:	Tyler Cornia
Hon. Janet Barton	Mark Meltzer	Lawton Jackson
	Ashley Dammen	Rosalind Greene
	Julie Graber	(by telephone)
		Kymberly Lopez

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1. Call to Order; introductions; approval of meeting minutes: The Chair called the meeting to order at 10:05 a.m. The Chair introduced Mr. Jeanes and Ms. Pollard. Mr. Jeanes and Ms. Pollard commented on the rapid advance of technology in the courts, and the challenge of satisfying the expectations of attorneys and jurors for access to technology within their respective courthouses. The Chair then asked the members to review the draft minutes of the April 6 meeting, noting two corrections previously made to the draft.

> **Motion:** A member made a motion to approve the April 6 minutes with those corrections. The motion received a second and the motion passed unanimously. **Wireless 12-002**

2. Rosalind Greene's presentation on juror issues: The Chair invited Rosalind Greene to share her views on the impact of wireless mobile technology and social media on juror conduct. Ms. Greene is a jury consultant, a member of the State Bar of Arizona, and a former litigator. Ms. Greene was present by telephone as she was in New Orleans attending a convention of the American Society of Trial Consultants.

Ms. Greene began by describing use of new technology by four types of potential jurors. *"Addicts"* are compulsive users of the internet and social media; *"rebels"* will do the opposite of

what courts ask them to do; *"helpers"* believe that being a good juror is finding out as much as possible about the case from extraneous sources; and *"five-minutes-of-famers"* desire to be the center of attention and seek special recognition. She suggested identification of the *"addicts"* early in the jury selection process, and recommended that the court excuse those individuals. The other groups may respond favorably to instructions from the court about fairness, team effort, cooperation, and rationales for the rules of juror conduct.

Ms. Greene said that admonitions to the jurors are the most effective method of preventing a juror's misuse of the internet and social media during a trial. She stressed three elements of effective admonitions: communication, repetition, and language.

Communication: Ms. Greene is an instructor on communications, and she noted that what is important is not only what the judge says, but also how the judge says it. She encouraged judges to refrain from merely relying on the robe as authority and reciting admonitions by rote. She suggested that a judge take on the role of an advocate by persuading jurors to follow the admonitions, to deliver admonitions as an attorney delivers a closing argument, and to engage the jurors directly and dynamically.

The court has several opportunities to give admonitions to a jury. Ms. Greene said that Florida recommends giving a full admonition before and after voir dire, and a third time prior to deliberations. She suggested including a brief admonition in the juror summons, and in a juror questionnaire if one is used. An admonition could also be included in a video played in the jury assembly room; the video could describe harmful consequences if jurors fail to follow rules, and even provide specific examples where that occurred.

It is critical that the court inquire into a juror's use of technology during voir dire, and not rely on counsel to do this because attorneys may be reluctant to ask, or because attorneys may have limited time during voir dire. Ms. Greene recommended that a judge specifically ask jurors if their internet and social media use interferes with other activities, and then later connect this dialogue with the formal admonition. Ms. Greene expressed a growing concern: the number of individuals who use the internet and social media is now a large segment of society, and removing everyone who is an internet or social media *"addict"* from the panel could result in a jury that is not representative of the community as a whole.

Repetition: The court could give a short admonition before breaks, but Ms. Greene felt that simply saying, *"Remember the admonition,"* is too short. Ms. Greene was supportive of staff's proposed *"smart juror"* card, and she suggested that the court could reinforce the message on the card if the court held up a large cutout of the card before a break. Ms. Greene also encouraged judges to give the admonition, information about the consequences of violating the admonition, and a juror's duty to report other jurors' violations of the admonition, during the final jury instructions, so the admonition is fresh when the jury begins deliberations.

Ms. Greene discussed other mechanisms of repeating the admonition. One mechanism is a written juror pledge, such as the one used in the Bout case in New York. The judge could ask

during voir dire if any potential juror would object to signing a written pledge, and if so, the judge would excuse the juror. Alternatively, she suggested obtaining a verbal commitment from jurors to follow the admonition, although an oral commitment may not be as effective as one in writing. Posters in the jury room containing admonitions might also be effective. The American College of Trial Lawyers materials includes a model message for a juror to give to family and friends requesting that family and friends not ask the juror about the case until it concludes.

Language: Ms. Greene's third point was that the language of the admonition should be simple, specific, and concrete. Concrete language in an admonition mentions devices by name, so that the admonition becomes more meaningful and personal when a juror hears the name of his or her device in the admonition. The admonition should also mention specific internet sites or applications such as LinkedIn, Twitter, or chat rooms; and the admonition can incorporate new names as the technology evolves.

Ms. Greene's suggestions concerning staff's proposed draft admonition included: adding *"tweets"* and *"blogs"* to the draft; and including in the draft that a juror should not *"friend"* a party. She also said that telling a juror to *"not discuss"* implies a two-way conversation, but a one-way post or blog would also violate the admonition, so use a word other than *"discuss"*

Ms. Greene liked the draft's inclusion of rationales, and the emphasis in the draft of the concept of fairness. She referred to the phrasing used in the American College of Trial Lawyers materials that explains the concept of fairness. She suggested a metaphor of the courtroom as a playing field where both sides have agreed to conduct the case and have the jury decide the case by the court's rules, one rule being that the jury may consider only the evidence produced in court. An admonition might include generic mention of penalties for violations, or specific penalties such as fines, contempt, and perjury.

Ms. Greene recommended that a judge take a proactive role by questioning jurors throughout a trial, such as after breaks, about whether they used the internet or social media, rather than asking for information at a late stage of the case. She added that jurors are less inclined to seek information from sources outside the courtroom when rules allow jurors to ask questions during a trial, as Arizona's rules allow.

Studies and anecdotes: Ms. Greene informed the members of a study where almost 10% of judges reported that they observed jurors using smart phones in the courtroom, notwithstanding an admonition not to use their devices in court. A Reuters study found that 90 verdicts were challenged between 1999 and 2010 because of juror misuse of the internet, with most of the challenges occurring in 2009 and 2010 as more jurors acquired technology; and that in 21 of these cases, verdicts were overturned

Ms. Greene also reported that a Florida judge held a juror in contempt and imposed a three-day jail sentence for *"friending"* a defendant. In another case, a judge dismissed a juror who conducted an internet poll on whether a defendant was guilty. A Michigan judge fined and ordered a juror to write an essay for violating an admonition. A juror in an Arkansas capital case

continued to tweet despite a warning, resulting in a mistrial, although the juror received no punishment.

Ms. Greene added that some courts might not punish jurors for violating an admonition because punishment could discourage the reporting of violations, and it is preferable that a court learn of a violation and take corrective action than to never know about it. Courts should encourage juries to self-report violations. Punishment is also problematic because of the nature of jury service, and because it might discourage prospective jurors from complete engagement in a case.

Ms. Greene concluded with an observation that courts might not be able to solve jurors' revolutionary use of the internet. A paradigm shift may then occur whereby courts would permit partial use of the internet by jurors. Scholars are studying how constitutional requirements for a fair trial can coexist with social media and the internet.

Questions and comments: Members then had the following questions and comments:

1. The court could add an admonition to the juror orientation video that is available on-line.
2. Many people use *"apps,"* so we should add this term to the draft admonition
3. Can the court phrase admonitions positively? Ms. Greene replied that jurors respond more favorably with positive phrasing.
4. Jurors frequently complain about repetitive admonitions as being insulting to their intelligence; what is the proper balance? Ms. Greene said that despite repetitive admonitions, some jurors still do not understand the concepts. She suggested delivering the admonition in different ways to break the monotony, such as pledges, a *"smart juror"* card, and mixing long and short admonitions. Individual jurors absorb the admonition differently. A member added that jurors usually do not mind repetition if it is done respectfully.
5. Does she feel the written pledge is effective? Ms. Greene stated that she is only aware of its use in the Bout case, but that jurors who sign a written pledge may be less inclined to violate the admonition. Judges could first try a verbal pledge and assess if that is effective.
6. Should jurors be required to disclose Twitter handles so the court can monitor activity? Ms. Greene noted that this occurred in the Casey Anthony trial, but it is probably inappropriate in ordinary cases.
7. What is the impact of the media on jurors, and do witnesses testify differently when the media is present? Ms. Greene will ask this question to other attendees at her conference.

The Chair then thanked Ms. Greene for her presentation, and the members continued with a discussion of juror issues.

4. Committee's discussion of juror issues: The Chair asked staff to elaborate on the *"smart juror"* card. Staff explained that the proposed card is a non-verbal method of delivering the admonition to the jurors. When the court empanels a jury, it could provide each juror with one of the cards, which would be about the size of a smart phone and would have the feel of a playing card. A juror could use the card as a bookmark, or could simply place the card in a

pocket or handbag, as a continuous and tangible reminder of the admonition. Staff circulated a prototype card, and the members concurred in recommending use of a *"smart juror"* card.

Staff also provided a draft admonition for use in criminal and civil cases. Committee members made the following comments concerning the draft admonition:

1. Potential jurors may not read an admonition contained in a summons; but the summons could include a link to the juror orientation video so jurors could watch a video presentation concerning the admonition.
2. Prescreening questionnaires could include a brief admonition.
3. The distinction between the admonition in a civil and a criminal case is that a civil jury may discuss the case while it is in progress; otherwise, the admonition should be the same.
4. The admonition should require jurors to report violations. A jury that self-polices may help avoid a mistrial, because when a judge receives a note from a juror about a violation, the court is able to deal with the issue.
5. The admonition should refer to *"jury service"* rather than *"jury duty."*
6. An admonition should use readily understood words. The admonition should advise of the consequences for violations by using non-threatening language.
7. A judge should explain prohibitions, and reasons why they exist, during voir dire.
8. The admonition should mention the burden of proof, that the rules require a party to meet its burden of proof, and that a juror should not do internet research to fill a gap if a party has not met its burden of proof.
9. A short admonition or commitment could be included in the juror's oath.
10. Excessive attention to the admonition may detract from other important concepts during a trial.
11. The judge should tell jurors at the beginning of a trial when they will be able to talk with family and friends about the case.
12. It would be appropriate to include an admonition in the concluding instructions.
13. In addition to RAJI preliminary criminal 13 and civil 9, the committee should review the language in RAJIs about excusing jurors to deliberate, and alternate jurors.
14. The committee should draft an admonition for consideration by the State Bar.

ACTION: The Committee established a workgroup to revise the draft admonition. Members of the workgroup include Justice Brutinel, Judge Downie, Judge Conlogue, and Judge Jeffery.

5. Policy decisions: The members then considered staff's matrix of who may use portable electronic devices in the courthouse or courtrooms, and the allowable uses of devices. For areas of the courthouse other than courtrooms, the members were mindful that some use of cameras could be benign and appropriate, but other uses could be disruptive, intrusive, or antagonistic, and on balance, the members concluded that the policy should preclude the public's use of cameras within the courthouse. The members added the use of audio to this general prohibition.

The members also considered the use of portable electronic devices by witnesses who are waiting to testify in a case. While someone in the courtroom may communicate electronically

with an excluded witness, implications of this situation are similar to what existed before the advent of the new technology, that is, a person in the courtroom could simply walk outside and tell the witness what was occurring in court. Requiring a witness to surrender a device outside the courtroom would be problematic, and admonitions may remain the most viable way of dealing with this issue.

ACTION: The committee should review Rule 615 concerning exclusion of witnesses and determine whether to add that a witness may not follow tweets or blogs.

Members of the public can text or tweet from a courtroom, although some courts preclude this in specific situations, such as criminal competency hearings. Judges may not be aware from the bench when someone is texting, and if texting is precluded in a specific case, court personnel would need to be in the back of the courtroom as monitors. As that would be resource intensive, and just as the public can use pen and paper in the courtroom, the members agreed that individuals should generally be allowed to text or tweet from a courtroom whenever a proceeding is open to the public. The proposed matrix would allow a judge to preclude texting or tweeting if it was distracting or disruptive. The members determined that Rule 611 sets out principles for order and decorum in the courtroom.

Jurors occasionally, and inappropriately, text from the courtroom while the court is conducting a bench conference; but the members agreed that if the court is conducting a prolonged bench conference, the jury should be removed and allowed to use their devices outside the courtroom. The court should allow jurors during a recess to use a device as any member of the public. Jurors should turn off their devices when the jury retires for deliberations, and the concluding admonition should include this instruction. However, the court should provide jurors with a court telephone number that family or friends can call to contact a deliberating juror for a true emergency. In one county jurors are asked to surrender their devices to court staff during deliberations, but no events prompted this policy and that county may reexamine the practice as a result of this committee's discussions.

6. Rule 122: The Chair then asked staff to explain changes to a draft revision of Supreme Court Rule 122. Staff said the intent of the revisions was to restyle, reorganize, and update the rule, but not to alter the substance of the rule. Restyling included adding subsection headings; adding definitions and a definition of *"media"* in particular; and avoiding legal jargon. Reorganization of the rules provided a sequential process and combined existing paragraphs with related subjects. Staff suggested that the members consider updates to reflect changes in technology since adoption of the rule in 1993, and to integrate citizen journalists within the scope of the rule. Member comments on the revised draft and on Rule 122 generally included the following:

1. Who is a journalist, and how is a journalist distinguished from a member of the public?
2. Judges have flexibility under Rule 122 to determine who the *"media"* is. Generally, *"media"* are those who are able to disseminate information broadly and professionally. The judiciary is a transparent department of government, and the purpose of Rule 122 is for the media to provide the public with information about court proceedings.

3. The rule would provide a more orderly process if media were required to give the court at least 7-10 days notice of an intent to cover a court proceeding. The two-day notice currently required by the rule is too short.

4. Who has the responsibility of notifying a non-party witness of media coverage? Do attorneys have this duty? If so, do attorneys frequently overlook giving a witness notice?

5. If a non-party witness objects to coverage, is the court required to hold a hearing outside the presence of the jury? Should this be resolved in advance of the witness' testimony so it does not delay the trial? If a witness does not want to be filmed, does the judge have inherent authority to prohibit coverage without holding an evidentiary hearing?

6. Although the draft rule attempts to define who is a *"journalist"* and what is *"news,"* courts are reluctant to define the words because these terms are hard to define.

7. Staff acknowledged that he should have omitted from the draft a requirement that a journalist submit a request to make an audio recording.

8. Judges should have discretion to exceed the limit of one camera in the courtroom.

9. The rule allows one television camera and one still camera, but because most new still cameras can also record video, as a practical matter the rule allows two video cameras.

10. The rule requires a *"pool"* feed if multiple organizations want coverage, but a new entrepreneur may not have the technology needed to participate in the pool.

11. Is it the court's responsibility to determine whether a person is unable to receive a pool feed? Does the present rule favor institutional journalists? Has any Arizona court denied a request from an entrepreneurial journalist to cover a proceeding?

12. Unless allowed pursuant to a Rule 122 request, the court does not permit camera phones; the court could post signs in courtrooms to give the public notice of this policy.

13. Someone is going to have to address the impact of technology changes on Rule 122.

14. Restyling Rule 122 would be helpful because as currently written, a user often has to read the entire rule to find the answer to a specific question.

15. If the committee makes revisions to the rule, the provision that states, *"media equipment shall be connected to existing courtroom sound systems"* should be clarified to assure that the media equipment does not connect to the court's FTR (*"for the record"*) system.

16. Rule 122 works well as currently written. The rule could be written more clearly, but would revising the rule be a productive use of the committee's time?

ACTION: Based on the discussion, the Chair directed staff to prepare another revision of Rule 122 with a focus on restyling of the current rule. The draft or an alternate version should include language that would allow a judge to decide whether the person submitting the request is entitled to provide coverage, in addition to deciding whether to allow coverage.

6. Call to the Public; Adjourn: There was no response to a call to the public. The meeting adjourned at 2:50 p.m.

The next meeting date is **Thursday, August 30, 2012.**